consist of arguments/opinions rather than facts. In all the three affidavits affirmed by THC, he said that what he deposed to were from information and knowledge acquired by him personally unless otherwise stated. The contention of counsel for the defendants is that THC did not state whether THC was with the plaintiffs in 1971; so the facts relating to the events in 1971/1972 could not be within his personal knowledge. Further, some of the facts deposed to are technical and it is not stated that he has the technical competence. It seems to me that knowledge/information acquired by THC from the records maintained by the plaintiffs is no less information and knowledge acquired by him. Even if I were wrong here, the defect is extremely slight. The fault of THC was in not stating expressly that the information was also obtained from records maintained by the plaintiffs, which is the information used in the defendants' affidavits. In any case, the events which are crucial for the present proceeding are all set out in the JVA and other agreements and the contents of those instruments are not disputable or are not disputed. As regards the complaint that the affidavits contained arguments/opinions, I am afraid this flaw is to be found in the affidavits of both sides. This, of course, should not be the case.

Then there is the question of delay. The defendants say that there was delay on the part of the plaintiffs in coming to court for reliefs. Let me quickly recount the critical facts. On 8 March 1990 at the meeting between Dr Hong Hai and Mr Donald Chia, the plaintiffs were assured that the new products would not be in direct competition with the Tiger Balm products. The first public advertisement of the new products appear in the 1 May 1990 issue of the NTUC News. On 15 May 1990 the plaintiffs, through their solicitors, wrote a letter to the first defendant, which was copied, inter alia, to the second and third defendants, complaining about the passing-off, breach of contractual obligations and fiduciary duty and unlawful use of confidential information. The letter demanded that the first defendant and his companies cease the infringing acts, failing which action would be taken by the plaintiffs against them. Correspondence followed between the solicitors for the two sides. The writ was filed on 19 June 1990 and the interim orders obtained on 22 June 1990. The plaintiffs have not explicitly stated what was the date on which they actually came across the Lion Balm products in the market. On these facts I do not think there has really been any undue delay on the plaintiffs' part in instituting this action and if there is any delay, it is only a very slight one and not one of such an inordinate nature as to warrant disentitling the plaintiffs to interlocutory reliefs.

The last point that I would touch on is the argument that the interim injunction obtained against the first defendant is effectively a mandatory injunction. I do not see any merit in that. The injunction does not compel the first defendant to do any act. The first defendant is quite free to do anything he wishes other than those he is injuncted from doing.

Applications dismissed.

Solicitors: *Lee & Lee; Allen & Gledhill.*

Reported by *Terence Tan Bian Chye*

'The Vishva Apurva'; Owners of Cargo lately laden on board the Ship or Vessel 'Vishva Apurva' v Owners and other persons interested in the Ship or Vessel 'Kalidas'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NO 230 OF 1988
CHUA J
29 JANUARY 1991

Conflict of Laws — Foreign jurisdiction clause — Exclusive jurisdiction clause — Plaintiffs commencing action in Singapore in breach of clause — Whether court should stay action — Procedural advantages — Merchant Shipping Act (Cap 179, 1985 Ed)

Shipping and Navigation — Bill of lading — Indian jurisdiction clause — Damage to goods carried on board vessel — Collision of vessel and loss of entire cargo — Cargo owners commencing action in rem in Singapore against shipowners

Civil Procedure — Stay of action — Exclusive foreign jurisdiction clause in contract — Applicable principles — English law and practice — Civil Law Act (Cap 43, 1985 Ed), s 5

The defendants, who are the State Shipping Corporation of India Ltd, owned the vessel the 'Vishva Apurva' which carried cargo belonging to the plaintiffs under bills of lading. The plaintiffs had shipped the cargo on board the 'Vishva Apurva' at Yxpila, Finland pursuant to bills of lading numbered 2 and 11. The cargo was to be discharged at Madras and Bombay in India. Enroute to India, the entire cargo and the 'Vishva Apurva' sank in a collision with the mv 'Dias' in the Red Sea on or about 6 August 1987. To enforce their claim for the loss of cargo, the plaintiffs cargo-owners commenced an action in rem against the defendants' ship, the 'Kalidas' in Singapore and caused the 'Kalidas' to be arrested on 5 August 1988. The plaintiffs contended that the 'Vishva Apurva' sank because she was unseaworthy in that the vessel was, at all material times, improperly manned and equipped or supplied and that the defendants had failed to exercise due diligence to make the 'Vishva Apurva' seaworthy.

The defendants applied by summons-in-chambers for a stay of all further proceedings in the plaintiffs' action in rem. The said application was dismissed by the assistant registrar on 6 February 1990. Subsequently, the defendants filed a notice of appeal to the judge-in-chambers on 9 February 1990 against the decision of the assistant registrar.

Before the judge-in-chambers, the defendants contended that although the plaintiffs' claim fell within s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), the plaintiffs' action was to be stayed in view of cl 17 of the

bills of lading which provided that '... The contract evidenced by this bill of lading shall be governed by the law of India and any dispute arising hereunder shall be determined by the Indian courts according to that law to the exclusion of the jurisdiction of the courts of any other country.' In addition, the defendants contended that the plaintiffs' action ought to be stayed as all the evidence on issues of fact as to the seaworthiness of the 'Vishva Apurva' would not be available in Singapore. The defendants also contended that none of the parties to the plaintiffs' action had any real connection with Singapore as the plaintiffs would either be the Finnish shippers or the Indian consignees with places of business in their own country.

Held, dismissing the defendants' appeal:

(1) The court has a wide discretion in deciding whether to permit the action in rem to proceed or to uphold the foreign jurisdiction clause and stay the plaintiffs' action. In deciding whether or not to stay an action commenced in breach of an exclusive foreign jurisdiction clause, the court will have regard to English law and the practice followed by the English courts unless other provision is made by any law in force in Singapore.

(2) There is a prima facie case for a stay of proceedings brought in breach of an exclusive foreign jurisdiction clause. However, the court has a discretion to refuse an application for a stay of the proceedings if the facts and circumstances of the case are so exceptional as to amount to strong cause for the court not to grant a stay of the proceedings.

(3) The burden of proving that the facts and circumstances are so exceptional as to amount to strong cause for the action to proceed lies on the plaintiffs who have brought the action in breach of the exclusive foreign jurisdiction clause.

(4) The plaintiffs have shown that the facts and the circumstances of the case are so exceptional as to amount to strong cause and to warrant a refusal of the defendants' application for a stay of the proceedings.

(5) If the action were to proceed in the Indian court, there will be very considerable delay (of at least ten years) before the matter comes to trial.

(6) The fact that the Singapore proceedings have been under way for a substantial time and have involved the parties in substantial costs and are ready for trial, is a strong factor in favour of refusing the defendants' application for a stay of the Singapore action.

(7) The abolition of party and party costs in India in 1977 means that the plaintiffs will not be able to recover costs on a realistic basis. Substantial justice would not be done if this case were to proceed in the Indian court as the success of the plaintiffs in monetary terms would necessarily and substantially be diminished. This is clearly a juridical disadvantage to the plaintiffs should the case proceed in the Indian court.

(8) The defendants' unreasonable delay in applying for a stay of the plaintiffs' action in rem is a factor which the court is entitled to take into account in deciding on whether or not there should be a stay of the proceedings.

(9) With regard to the evidence to be given by the ship's officers and crew, there is no significant difference (to the defendants) so far as convenience and expense is concerned between travelling to Singapore or India. In this connection, the defendants would not be put to any inconvenience or extra expense if the plaintiffs are permitted to proceed with their action in Singapore.

(10) With regard to the applicable law, there appears to be some doubt as to the law which would be applied by the Indian court.

(11) Moreover, if a stay of the plaintiffs' action is ordered, the plaintiffs would lose the certainty of the Singapore limits of liability. In India, the limits of a shipowner's liability for loss or damage to goods where the loss of or damage to goods occurred without the actual fault or privity of the shipowners are lower than that which obtains in Singapore under the provisions of the Merchant Shipping Act (Cap 179, 1985 Ed).

(12) The plaintiffs had commenced action in the High Court of Bombay, India for the sole purpose of protecting their right for enforcement of their claims against the defendants following the defendants' refusal to extend time beyond the one-year time limit. In any event, the plaintiffs stated that if the court dismissed the defendants' application for a stay of the Singapore action, the plaintiffs would withdraw their action in the High Court of Bombay.

(13) On the facts and evidence before the court, the defendants have no genuine desire for trial in India.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 107 of 1990.]

Cases referred to

1 *'The Eleftheria'* [1969] 1 Lloyd's Rep 237 (folld)
2 *Amerco Timbers Pte Ltd* v *Chatsworth Time Corp Pte Ltd* [1977] 2 MLJ 181 (folld)
3 *'The El Amria'* [1981] 2 Lloyd's Rep 119 (refd)
4 *'The Sidi Bishr'* [1987] 1 Lloyd's Rep 42 (refd)
5 *'The Vishva Ajay'* [1989] 2 Lloyd's Rep 558 (refd)
6 *Roneleigh Ltd* v *Mll Exports Inc* [1989] 1 WLR 619 (refd)
7 *'The Indian Fortune'* [1985] 1 Lloyd's Rep 344 (refd)
8 *'The Biskra'* [1983] 1 Lloyd's Rep 59 (refd)
9 *'The Volvox Hollandia'* [1988] 2 Lloyd's Rep 361 (refd)
10 *'The Vishva Abha'* [1990] 2 Lloyd's Rep 312 (refd)

Legislation referred to

Carriage of Goods by Sea Act (Cap 33, 1985 Ed)
Civil Law Act (Cap 43, 1985 Ed) s 5
High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) s 3(1)(g)
Merchant Shipping Act (Cap 179, 1985 Ed)
Carriage of Goods by Sea Act 1925 [Ind]
Merchant Shipping Act 1958 [Ind]

Belinda Ang for the plaintiffs.
Lawrence Boo for the defendants.

Cur Adv Vult

Chua J: The plaintiffs' claim is for damages in respect of the total loss of the plaintiffs' cargo shipped on board the defendants' ship the 'Vishva Apurva' of the port of Bombay pursuant to bills of lading numbered 2 (Yxpila, Finland, to Madras) and 11 (Yxpila to Bombay).

The loss arose out of the collision in the Red Sea on or about 6 August 1987, between the 'Vishva Apurva' and the Greek ship the 'Dias'. Following the collision, the 'Vishva Apurva' sank with her entire cargo.

The plaintiffs commenced the present proceedings in Singapore on 5 August 1988, and seized the defendants' ship the 'Kalidas'.

Proceedings were instituted against the defendants on 5 August 1988, in the High Court of Bombay on behalf of Pohjola Insurance Co Ltd in respect of their subrogated claims under the bills of lading numbered 2 and 11 issued in respect of the plaintiffs' cargo (Suit No 2567 of 1988).

The defendants are The State Shipping Corporation of India Ltd, a government company incorporated under the Indian Companies Act 1956 with their registered office in Bombay.

The bills of lading issued in respect of the plaintiffs' cargo contain the following clause:

> 17 Jurisdiction Clause: The contract evidenced by this bill of lading shall be governed by the law of India and any dispute arising hereunder shall be determined by the Indian courts according to that law to the exclusion of the jurisdiction of the courts of any other country.

The defendants applied by Summons-in-Chambers No 4151 of 1989 for a stay of all further proceedings in this action. The summons was dismissed by the assistant registrar on 6 February 1990. The defendants filed notice of appeal to the judge-in-chambers on 9 February 1990.

The appeal came before me on 15 October 1990 and I dismissed the appeal with costs. The defendants have filed a notice of appeal to the Court of Appeal.

I now give my reasons.

It is not in dispute that this court has jurisdiction to entertain in Singapore the plaintiffs' claim against the defendants under s 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed).

The question for determination is whether this action ought to be stayed in view of the foreign jurisdiction clause in the bills of lading.

It is also not in dispute that this court has a wide discretion in deciding whether to hear the parties to this action or whether to uphold the foreign jurisdiction clause and stay the action. In deciding such questions the Singapore court has recourse to English law and the practice followed by the courts in England, unless in any case other provision is made by any law in force in Singapore (s 5 of the Civil Law Act (Cap 43, 1985 Ed)).

In England, the principles are enunciated in the leading judgment of Brandon J in *'The Eleftheria'*[1] at p 242, in which he summarized what appeared to him to be the principles established by the authorities which had been cited to him. The principles are:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
> (3) The burden of proving such strong cause is on the plaintiffs.
> (4) In exercising its discretion the court should take into account all the circumstances of the particular case.
> (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:
>
> (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
> (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material aspects.
> (c) With what country either party is connected, and how closely.
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In Singapore, the Court of Appeal in *Amerco Timbers Pte Ltd* v *Chatsworth Time Corp Pte Ltd*[2] stated the principles in words very similar to that of *'The Eleftheria'*.[1] Kulasekaram J (delivering the judgment of the court) said (p 181):

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies for a stay, the Singapore court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.
> (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
> (c) With what country either party is connected and, if so, how closely.
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;
(ii) be unable to enforce any judgment obtained;
(iii) be faced with a time-bar not applicable here; or
(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In determining this appeal, I bore in mind that there is a prima facie case for a stay arising from the foreign jurisdiction clause. The plaintiffs must be bound by the foreign jurisdiction clause which they have agreed to. But this court has a discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause to the contrary. The burden lies with the plaintiffs.

The plaintiffs have shown that the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant a refusal of stay.

It has been clearly shown by the plaintiffs that if the case were to proceed in the Indian court there will be very considerable delay (of at least ten years) before the matter comes to trial, by comparison with its determination by the Singapore court. The Singapore action has been set down for trial on 6 September 1990.

Very great delay in the hearing of an action seems to me to be a denial of justice. Serious delay is a factor which should be taken into consideration (see *'The El Amria'*;[3] *'The Sidi Bishr'*;[4] *'The Vishva Ajay'*[5]).

The fact that the Singapore proceedings have been under way for a substantial time and have involved the parties in substantial costs and are ready for trial, is a strong factor in favour of the grant of stay of the Indian proceedings (see p 14 Supplement to *1988 Supreme Court Practice*).

The plaintiffs have adduced evidence that a successful litigant in India will not be able to recover party and party costs or even costs on a realistic basis. Party and party costs was abolished in India on 1 January 1977. The amount of costs recoverable by a successful litigant in the Bombay High Court is governed by r 606 of the Rules of the High Court on its original side. The amount recoverable under r 606 is based on the quantum of the claim but there is a ceiling to the amount of advocate's fees recoverable from the other side which is presently fixed at 38,500 rupees. If this case should proceed to litigation in Bombay, and should the plaintiffs succeed in the action, the maximum amount of costs recoverable by them from the defendants is limited to 38,500 rupees.

It seems to me that substantial justice would not be done if this case were to proceed in the Indian court as the success of the plaintiffs in monetary terms would necessarily and substantially be diminished as they would have to pay much higher costs than in Singapore. The effect of costs is relevant in considering juridical disadvantage (see *Roneleigh Ltd* v *Mll Exports Inc*[6]).

The plaintiffs have adduced evidence that a successful litigant who is resident outside India, will have to wait for a further period of nine months to one year before he is paid. A judgment debtor will, owing to exchange control, have to apply for and obtain permission for remittance of moneys outside India in satisfaction of the judgment sum. Some of the cargo claims against the defendants in India are brought by foreign insurers in exercise of subrogation rights and exchange control approval must be sought before payment can be made outside India.

The defendants say that the plaintiffs have the security of the defendants' P & I Club, London Steamship Owners' Association Ltd, which undertook to make payment on the plaintiffs obtaining final judgment in India or Singapore. Enforcement of any judgment whether obtained in India or Singapore would be against the London P & I Club for which no exchange control restrictions exist.

That might be so but the guarantee is only enforceable in the event the defendants failed to pay. Still the plaintiffs will have to wait and see if they will be paid.

The plaintiffs must have been aware of the exchange control in India when the contract was made. It is still of significance albeit marginal (see *'The Indian Fortune'*[7]).

There has been delay on the part of the defendants in applying for a stay of proceedings. The defendants did not take out the application until after the plaintiffs had filed their statement of claim in which they claimed the sum of US$1,635,329.85.

The writ was issued on 5 August 1989. The 'Kalidas' arrived in Singapore in January 1989 and was arrested and the writ was served on 11 January 1989. The 'Kalidas' was released on 12 January 1989, on the defendants providing security for the plaintiffs' claim by way of a letter of undertaking dated 27 January 1989, issued by the London Steamship Owners' Association Ltd for US$4.5m, which covers any judgment which may be made against the defendants in the High Court of Singapore or the High Court of Bombay. The defendants entered appearance on 23 February 1989. The statement of claim was filed on 3 June 1989. The defendants applied for stay on 20 July 1989.

An application for a stay on grounds that the parties have agreed to submit the dispute to a foreign court should be brought without delay after the service of the writ (see *'The Biskra'*;[8] *'The Sidi Bishr'*[4]).

The defendants say that their solicitors had informed the plaintiffs' solicitors shortly after the arrest of the vessel in January 1989 of the defendants' intention to apply for a stay and such intentions were repeatedly made known to the plaintiffs' solicitors. The reason that

the defendants did not file the application earlier was due to the voluminous documents that had to be collated from court files in Bombay and the defendants' agents all over Europe.

I am not convinced that it would take such a long time for the defendants to collate all the relevant documents to be exhibited to their affidavit to be filed in support of their application for stay. I am satisfied that there was unreasonable delay by the defendants after the writ was served.

The plaintiffs had loaded their cargo at Yxpila, Finland, for discharge in Madras and Bombay. The defendants say that evidence of the cargo volume and condition at the time of loading would not be in Singapore. As the cargo was not discharged here nor did the collision take place in Singapore, no evidence on such issues of fact as to the seaworthiness of the 'Vishva Apurva' would be available in Singapore. All these would have to be brought into this jurisdiction.

The defendants say that they had, following the collision, despatched surveyors and experts to investigate and all these evidence and documents pertaining to the voyage and operations are readily available in India. The defendants do not dispute that in this modern age, surveyors, experts and documents of records can all be transported here and this problem is thus not insuperable. However, the defendants say that it is clear that none of these would be available in Singapore without considerable inconvenience and expense.

The defendants say that all evidence on issues of fact are not in Singapore and would be more readily available in India. This, the defendants submit, is a significant consideration.

So far as the ship's witnesses are concerned, the ship's officers and crew are probably at sea and it is likely that for them there is no significant difference so far as convenience or expense is concerned between travelling to Singapore or India. As for the ship's witnesses who are in the employ of the defendants, there would be no difficulty for the defendants to get them to attend this court as the defendants' vessels call in Singapore regularly. The defendants would not be put to any inconvenience or extra expense.

The defendants have commenced an in rem action on 27 July 1989, in Singapore against the 'Dias' (Admiralty in Rem No 343 of 1989) for the collision. This step was taken by the defendants well after the plaintiffs commenced the present action against the defendants (5 August 1988) and after the defendants filed their application for stay on 20 June 1989. This shows that there is evidence in Singapore and/or that the defendants are prepared to and can bring the evidence they have to Singapore. It also shows that the defendants regard Singapore as an acceptable forum. In the event, the defendants managed to arrest the 'Dias' in South Africa only because the 'Dias' did not call at Singapore after the collision.

It is not absolutely correct for the defendants to contend that most, if not all, of the evidence and documents pertaining to the voyage and operations of the 'Vishva Apurva' are readily available in India, for the purposes of determining the issues in the dispute.

The defence filed in this action put the plaintiffs to strict proof of their title to sue. The plaintiffs' contention is that the 'Vishva Apurva' was improperly manned and equipped or supplied or that the owners had failed to exercise due diligence to make the ship seaworthy and that she sank not because of the collision but by reason of her unseaworthiness.

The plaintiffs say they intend to call as witnesses the Danish master and crew of the 'Alice Riis' who saw and took photographs of the 'Vishva Apurva' as she sank. Witnesses at ports of loading as well as from one or more of the loading ports where some repairs to the 'Vishva Apurva' were carried out will also be called.

The plaintiffs say that insofar as there is any dispute as to the plaintiffs' right to claim damages, evidence of quantum of claim will have to be brought from Finland.

Even if most of the evidence is in India, the convenience and advantage in proceeding in Bombay is rendered nugatory by the excessive delay faced by litigants in Bombay.

Oral testimony of eye-witnesses is of utmost importance. With delays their memory may fade and the longer the delay, the less chance there is of the evidence being convincing. Delay in India will have a significant effect on the location of evidence: witnesses may die or no longer can be found, all of which will seriously prejudice the plaintiffs if their action in Singapore is stayed.

The defendants say that the jurisdiction clause in the bills of lading is not a jurisdiction clause per se but also stipulates the governing law to be the law of India. The defendants submit that there is a distinct advantage which an Indian court has in determining its own law.

There appears to be some doubt as to the law the Indian court will apply. The Hague Rules are applicable in India by virtue of the Indian Carriage of Goods by Sea Act 1925. The defendants in the defences filed in India have denied that 'in view of the alleged contract of carriage, the dispute is covered by the provisions of the Carriage of Goods by Sea Act 1925.' The position under the Indian law is uncertain since the Indian Carriage of Goods by Sea Act 1925 applies only to shipments out of India.

The Hague-Visby Rules do not apply in India as India has not ratified the relevant 1961 Brussels Protocol. Singapore applies the Hague-Visby Rules.

The Indian court may decide that, as the Indian Carriage of Goods by Sea Act do not apply and that by cl 17 of the bill of lading disputes 'shall be determined by the Indian courts according to that law', then no Hague or Hague-Visby Rules will be applicable. The legal position in India is uncertain.

It is clear that in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the courts of that country. But all things are not equal in the present case. Singapore courts have always applied the Hague Rules under the Singapore Carriage of Goods Ordinance prior to the enactment of the Carriage of Goods by Sea Act 1972 which gives effect to the Hague-Visby Rules.

Following the casualty, the defendants were confronted with numerous claims by cargo owners for the loss of their cargo. On 28 June 1988, the defendants commenced limitation proceedings under the Indian Merchant Shipping Act 1958 (Admiralty No 17 of 1988) seeking a declaration that their liability be limited to Rupees 5,252,241.50. By order of court dated 9 August 1988, the High Court at Bombay ordered and directed that the defendants deposit with the admiralty registrar of the High Court, Bombay, the sum of Rupees 5,252,241.50 or furnish a bank guarantee for the same sum to constitute as the limitation of the 'Vishva Apurva'. Pursuant to the said order, the defendants furnished a banker's guarantee in the sum of Rupees 5,252,241.50 on 19 August 1988, to abide by the further outcome of the proceedings in Admiralty No 17 of 1988.

The application of the defendants, Admiralty No 17 of 1988, was made ex parte. On 30 November 1988, a notice of motion was filed by the insurers (Berlin) and the reinsurers (Prague) of some of the cargo loaded on board the 'Vishva Apurva', to set aside the order of 9 August 1988. The hearing of the said notice of motion was adjourned several times in 1989 and was only fully heard on 25 June 1990, together with the notice of motion filed by Hindustan Shipyard Ltd, one of the consignees, which had also applied for the order of 9 August 1988 to be set aside or stayed. Judgment was delivered on 5 July 1990, setting aside the order of 9 August 1988.

The learned judge was of the view that the order of 9 August 1988, establishing an interim limitation fund, 'is clearly without any provision of any law or of any rule of this High Court'. He said:

> It is a matter of substantive law and in the absence of any provision for the purpose of an interim limitation fund, it is not possible for me to grant any such relief. The fundamental assumption when the court constitutes a limitation fund is that the plaintiffs are not at fault. That fact will have to be established and then only can the court proceed with the constitution of any such fund.

The plaintiffs say that the limitation of owners' liability under the Singapore Merchant Shipping Act (Cap 179, 1985 Ed) for loss of or damage to goods, where the loss or damage occurred without their actual fault or privity, would be higher than the limitation under the Indian Merchant Shipping Act. In the present case the limits of the defendants' liability in Singapore would be approximately S$1,485,776.50 or equivalent approximately to US$769,832.38 as against Rupees 5,252,241.50, or equivalent approximately to US$353,000 in India. The defendants have not disputed these figures.

If a stay is granted the plaintiffs would lose the certainty of the Singapore limit of approximately US$769,832.38. It would be unjust to the plaintiffs to deprive them of the Singapore limit.

The defendants say that none of the parties to these proceedings have any real connection with Singapore. The plaintiffs would either be the Finnish shippers or the Indian consignees with places of business in their own countries. Whereas, the defendants are an Indian government company with their headquarters in Bombay. The 'Vishva Apurva' is registered in India and was crewed by Indian nationals. Apart from the fact that the defendants' ship 'Kalidas' was served with the writ and that their ships call at Singapore regularly as part of their worldwide trade, there is no real connection by any of the parties in this dispute with Singapore.

The plaintiffs are not all Indians. They reside in Finland, Netherlands and other European countries. It cannot be said that the country with the closest connection is India.

The defendants say that their genuine desire for trial in India is well demonstrated by the active steps taken by them both in India and elsewhere. The defendants had wasted no time in setting up the limitation fund (albeit now set aside); provided securities both to abide by Indian and foreign court judgments; advertised actively all over Europe inviting potential interests to lay claims in Bombay; taken steps to expedite the trial of the limitation action in Bombay.

It appears to me that the defendants have no genuine desire for trial in India. They were seeking a procedural advantage when they wasted no time in commencing limitation proceedings under the Indian Merchant Act 1958. They did not issue stay summons until after the plaintiffs had filed their statement of claim which indicates that they do not mind Singapore jurisdiction. The defendants commenced in rem action on 27 July 1989, in Singapore against the 'Dias', the other vessel involved in the collision, well after the plaintiffs commenced their action in Singapore on 5 August 1988

and after the defendants filed their stay summons on 20 January 1988. This is very indicative that they regard Singapore as an acceptable forum and shows that the defendants are only after a procedural advantage in India where the limitation is lower and do not genuinely desire trial in India.

The plaintiffs say that the Indian action Suit No 2567 of 1988 commenced on behalf of Pohjola Insurance Co Ltd was solely to protect the right for enforcement of those claims from being extinguished following the defendants' refusal to extend time beyond the one year time limit. Further, it is the advice of the solicitors of the insurance company that under Indian law, it is not possible by agreement between a shipowner and cargo claimants to validly extend the one-year time limit prescribed by law for commencing legal proceedings. Under Indian law there is no procedure by way of a mere issuance of a writ to protect the right for enforcement of the claims from being extinguished. It is necessary for a claimant to file a suit by lodging a plaint with full statement of claim incorporated therein. Apart from filing the suit and serving the writ of summons on the defendants on 7 October 1988, the insurance company, as plaintiffs, took no further steps in these proceedings.

Although some defences have been filed recently, the proceedings in India can be regarded as at initial stages. Limitation action is a separate matter from the cargo claim. Now that the limitation fund created ex parte has been set aside, the defendants would have to start all over again for it to be constituted and it would this time be contested. It is not necessarily unjust or inconvenient for liability and limitation to be tried separately (see *'The Volvox Hollandia'*[9]).

The defendants say that in exercising its discretion, the court here must take into account the multiplicity of actions here and in India. The Indian courts are already seized with a vast majority of the cargo claims arising out of the casualty. The main and real issue in the Indian actions and these proceedings that would ultimately determine the case is whether or not the 'Vishva Apurva' was unseaworthy and/or whether the defendants had actual fault or privity in the collision and the consequent sinking of the vessel and her cargo. It would be disastrous, say the defendants, if the courts in India and the court here come to differing conclusions despite facts arising from the same casualty.

Furthermore, action has been taken to consolidate all the actions in Bombay but this would not be possible in respect of the plaintiffs' case here. Discovery proceedings in this action would be duplicating similar processes in India and the defendants would be put to unnecessary expenses.

The plaintiffs say that such an outcome is only a theoretical possibility. If stay is refused, the Indian action will be withdrawn, since the plaintiffs genuinely desire Singapore litigation.

A writ was issued on 30 November 1988, in England by Alfred C Teopfer against the Shipping Corporation of India, the owners of the 'Vishva Abha'. The plaintiffs there were owners of cargo loaded on board the vessel 'Dias' and they claimed damages for loss and damages arising out of or occasioned by a collision between the vessel 'Dias' and the 'Vishva Abha'.

Mr Justice Sheen in his judgment in *'The Vishva Abha'*,[10] delivered on 16 March 1990, said:

> The action arises out of a collision which occurred in the Red Sea on 6 August 1987. The court is not aware of any of the facts relevant to the question of liability for that collision. It was a collision which occurred, apparently, in good visibility and I have been told that the stem of 'Vishva Apurva', a sister ship of the ship which has been arrested, collided with the port side of 'Dias'. Rather surprisingly it was 'Vishva Apurva' which sank. I say 'rather surprisingly' because, from what I have been told of the collision, it would seem that water might enter her forward compartments, and, perhaps, No 1 hold; but water flooded other parts of the ship so that she sank. As a result of that disastrous collision, there is litigation in a number of different jurisdictions: Singapore, India, Holland, South Africa and at the moment in this country. However, the only relevant litigation so far as this motion is concerned is the litigation in South Africa. I say that because I am told that the actions in Singapore and Holland are actions brought by owners of cargo which was damaged by reason of the sinking of the ship, and although that was, in one sense, a consequence of the collision, it is said to have resulted from the ship being unseaworthy, a matter with which I am not concerned. Those actions are claims in contract by the cargo owners.

The plaintiffs say that there is a strong prospect that both the courts in India and Singapore would find in favour of the owners of the cargo and no right to limit liability because there is fault and privity of the defendants.

For the foregoing reasons I dismissed the appeal.

Appeal dismissed.

Solicitors: *Ang & Partners; Haridass Ho & Partners.*

Reported by *David Chong Gek Sian*